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Supreme Court of the United States

October Term—1941.

No. 256.

DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN and IRVING ELENTUCH,

Appellants,

—*against*—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONERS GOLDSTEIN AND SCHWARTZ

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The Government has made five points in attempted support of the judgment of conviction (Br. pp. 9-13). We feel that two of them, those concerned with the scope and conduct of the preliminary hearing and with the charge of the court to the jury, have been sufficiently anticipated in petitioners' main brief and require no further treatment here. We shall deal only with the contentions with regard to the evidence adduced in the preliminary hearing and with the interpretation to be given Section 605 of the Communications Act.

POINT I.

The evidence at the preliminary hearing showed that the Government's case was contaminated by the use of illegal wiretaps, and the trial court made no finding to the contrary.

The Government seeks to avoid the determination of the principal question presented by this appeal, that concerned with the interpretation of Section 605, by arguing (a) that the trial court found as a fact that the Government had made no use of the illegal wiretaps and (b) that the finding is sustained by the weight of the evidence. Each of these contentions is unsound.

(a) *As to the findings of fact made by the trial court.*

Concededly the trial court did not find "in so many words" that wiretapping had played no part in obtaining the Government's evidence (Resp's Br. p. 15). Moreover, the record as a whole shows that the trial judge did not intend to make such a finding and that he intended to hold only that the defendants had not satisfied the burden of proof which he erroneously imposed upon them.

Although the Government conceded at the opening of the preliminary hearing that wiretapping had been employed (R. 118), the Court did not then shift to the Government, as he should have done, the burden of producing witnesses to prove that this wiretapping had not entered into the preparation of the Government's case. Instead, the entire proceeding was conducted upon the assumption that the defendants had the burden of proving that the Government's case had been thus contaminated. Witnesses were called by the defendants. Although each of these witnesses was closely affiliated with the prosecution, each was considered a wit-

ness for the defendants and the defendants were held to be bound by his testimony. Various statements of the Court throughout the hearing indicate that he was proceeding on the assumption that the burden was upon the defendants (R. 348, 424-5).

At the conclusion of the hearing the Court made no express finding to the effect that the Government's case had not been contaminated by the use of "wiretaps". In fact the Court expressly reserved the right to the defendants to object to testimony as it was introduced at the trial (R. 614, 615), thereby indicating that the Court did not intend to make any final determination. It is true that defendants' objections made at the trial to the competency of Messman and Garrow were overruled. This ruling, however, does not necessarily indicate that the Court had found as a fact that the testimony of Messman and Garrow had not been obtained by the use of wiretaps. The ruling is equally consistent with the theory that the Court had found merely that the defendants had not proved the contrary. The Circuit Court correctly so construed the rulings of the District Court. Since, concededly, the burden of proof should not have been placed upon the defendants, it necessarily follows that error was committed in permitting Messman and Garrow to testify, unless Section 605 is construed in such a way as to make the testimony admissible regardless of how it was obtained.

Moreover, even if an assumption be justified that the trial court found that the testimony had not been induced by the wiretapping, such finding cannot stand in view of the fact that it was arrived at through a misconception of the law. The trial court proceeded upon the assumption that the burden of proof was on the defendants. That assumption, which it is conceded was erroneous, necessarily vitiated any finding which the Court might have reached. Such is the

well-settled rule in the case of jury verdicts, where a jury had been improperly instructed with regard to the burden of proof. The rule must be the same where the trier of the facts is a judge sitting without a jury. The statement of the Circuit Court of Appeals, to which reference is made by the Government in its brief (p. 15) to the effect that it would have not have set aside a finding by the trial court had one been made, must be read in the light of the facts. It obviously means only that had the trial court made a finding upon a proper understanding of the law, that finding would not have been set aside. Since that was not the situation here, the Circuit Court's statement has no significance.

It is, therefore, not possible for the Government to argue (Br. pp. 8-9) that the case comes to this Court buttressed by findings of facts of two courts. Moreover, the rule relied upon by the Government in this respect is not inflexible. There are many instances in this Court, particularly where constitutional issues are involved, in which this Court has set aside findings of fact concurred in by two courts, both in cases arising in the Federal system itself and in cases coming from the State Courts. (See *United States* v. *Appalachian El. P. Co.*, 311 U. S. 377; *Norris* v. *Alabama*, 294 U. S. 587; *Smith* v. *Texas*, 311 U. S. 128.)

(b) *As to the facts established by the evidence.*

Petitioners believe it to be clear that even if the trial court had found as a fact that the Government's case was not contaminated by the use of wiretaps, such a finding would have been against the weight of the evidence. The evidence showed three respects in which wiretapping was of considerable importance to the Government:

(1) As a source of evidence in the first instance, apart from the testimony of Messman and Garrow.

(2) As a means of obtaining the confessions and the testimony of Messman and Garrow.

(3) As a means of refreshing the recollections of witnesses in the course of preparation for trial.

The evidence with respect to each of these aspects will be briefly considered.

(1) ***As to the sources of the Government's evidence.***

Both at the preliminary hearing and in its brief in this Court the Government, in marked contrast to the position taken by it prior to the decision of this Court in the *Weiss* case (Petitioner Goldstein's Br. pp. 9 ff.) has attempted to minimize the importance of the illegal wiretapping in the investigation and preparation of this case. As a matter of fact, wiretapping permeated that investigation from the outset. A brief chronological summary of the various steps in that investigation, as disclosed by this record, will make that clear. Those steps were as follows:

1. Bernstein saw Kipnis sometime in August 1936 (R. 182) at which time on Bernstein's statement "Kipnis had fully confessed to us and made a statement" (R. 234). This is *not* the statement referred to as Kipnis' confession (Government's Exhibit 5—dictated October 8, 1936).

2. August 1936—Room recordings and extension telephone interceptions commenced (R. 182). They were used intermittently at Kipnis' office (R. 183) and at Friedman's office (R. 186-7).

3. Telephone extension interceptions took place prior to the date of Kipnis' dictated confession. These inter-

ceptions were Defendants' Exhibit D (dated September 16, 1936); Defendants' Exhibit F (dated September 2, 1936); and Defendants' Exhibit H (dated September 15, 1936).

4. Kipnis dictated his confession—October 8, 1936 (Government's Exhibit 5).

5. Despite the confession dictated by Kipnis the telephone extension interceptions continued. Defendants' Exhibit G, November 7, 1936; Defendants' Exhibit L, consisting of three wiretaps of October 22, two of October 23, two of November 10, and one of November 5, November 13 and November 16.

6. The matter was presented to the United States Attorney's office and Post Office Inspector Shea was assigned to make the investigation on November 27, 1936 (R. 117).

7. Shea rendered his report of thirteen pages without any independent investigation on December 6, 1936, nine (9) days after the matter was assigned to him.

8. After Shea rendered his report the wiretapping by the insurance companies continued. (Defendants' Exhibit L—December 7; 9 [two wire taps]; 22; 24, 1936 [two wire taps]; January 11, 1937; January 13, January 29 [two wire taps]; February 8; February 18; Defendants' Exhibit C, February 12, 1937; Defendants' Exhibit I—February 1, 1937; Defendants' Exhibit J—December 14, 1936; Defendants' Exhibit K—January 2, 1937.)

9. In January, 1937 a conference was held at the United States Attorney's office (R. 301).

10. As a result of that conference, Messman's wires were tapped from January 29, 1937 to April 16, 1937 and from May 6, 1937 to May 20, 1937 (R. 101).

    The wires of Messman and Garrow were tapped between March 2, 1937 and March 5, 1937; from March 8, 1937 to April 16, 1937; and again from May 6, 1937 through May 20, 1937 (R. 101-102).

    The home and office telephone wires of Joseph J. Weiss were tapped from March 8 through April 16, 1937; and from May 6 through June 30, 1937 (R. 781).

    The transcripts and phonograph records were turned over to the United States Attorney and were indexed.

11. No investigation other than the wiretapping was made by the Government until after the arrest (R. 809).

12. In the preparation of trial briefs for the *Weiss* case, resort was had to the wiretaps. (Defendants' Exhibit M [Nelson's trial brief]; Defendants' Exhibit X [Messman's trial brief] See R. 525 ff.)

It thus appears that wiretapping was employed at every step of the investigation, both before and after complaint was made by the insurance companies to the Government. It also appears that in January, 1937, when the results of the insurance companies' investigation were made available to the United States Attorney, prosecution was not undertaken until after further extensive wiretapping had been carried out. The reasons for this deferment of action are entirely clear despite professions that the wiretapping was only for corroboration. The United States Attorney, and the attorneys for the insurance companies, at their conference in January, 1937, must have decided that the evidence theretofore acquired by the insurance companies was not

sufficient and that further evidence must be obtained by means of wiretapping before the Government could safely embark upon a prosecution. This is the only inference possible from the admitted facts.

Certainly, the Government offered no proof to dispel such an inference. Although the Government relies primarily on the confession of Kipnis as its most important "independent source", that confession was not revealed at the preliminary hearing in its entirety. No testimony was offered as to the circumstances under which Kipnis decided to confess; and Kipnis himself, although at all times in the control of the Government, was not produced as a witness.

It was generally recognized that Kipnis was not worthy of belief unless corroborated. (See opinion of Circuit Court, fol. 36.) Moreover, it is clear that Kipnis did not implicate petitioner, Schwartz. In the long testimony given by Assistant Attorney Dailey purporting to show independent grounds for the prosecution, there is also no reference to Schwartz whatever. And when counsel sought to question Inspector Shea more particularly with regard to individual defendants, the Court would not permit such questioning (R. 286, 301, 306). While Bernstein stated that he had information from sources independent of telephone conversations prior to the arrest (R. 256) and named Dr. Goldstein, but not Dr. Schwartz, as one of the persons concerning whom he had such information (R. 258), the nature of the information was not disclosed. There is no indication that it was even of a criminal character. So in the instances in which references to Goldstein were made (R. 396, 467), it appears merely that his name was known.

It is apparent, therefore, that, aside from the unreliable testimony of Kipnis (who was not called as a witness at any stage of the hearing or trial), there is no basis whatever for the statement of the Government that it had evidence

criminally implicating petitioners without recourse either to the wiretapping itself or to the testimony of witnesses obtained as the result of wiretapping.

(2) ***As to the use of wiretaps to obtain the confession of Messman and Garrow.***

In support of its contention that the evidence showed that Messman and Garrow were not persuaded to turn state's evidence as a result of being confronted with the wiretaps, the Government relies entirely upon the fact that Messman and Garrow so testified at the preliminary hearing. With respect to Messman the Government states (Br. p. 28) that:

> "There is no evidence contradicting Messman's testimony as to his own mental processes and his explanation is clearly plausible."

We believe that this assertion, which is the nub of the Government's argument, is manifestly fallacious. Obviously, there could be no direct testimony as to the operations of Messman's mind other than that presented by Messman himself. The other evidence in the case, however, demonstrates so conclusively that Messman's statement was untrue that even if the trial court had based a finding of fact upon that statement, the finding should be reversed as a matter of law.

The Court below said in its opinion (fol. 38):

> "He confessed that he was abandoned in morals, ready to do anything that would serve his turn, and showed himself utterly untrustworthy. It is indeed curious, if he had made up his mind to change front before he was arrested, that he failed to confess when he was first before the district attorney and waited until after Nel-

son had dilated upon the amount of evidence which had been accumulated against him. One would have expected that on his own story his arrest would have been enough to touch off his confession."

And with respect to Garrow, the Court below recognized that "his word was, if possible, even less reliable than Messman's" (fol. 39).

In view of these characterizations of the two witnesses by the Circuit Court of Appeals, it is apparent that their denials are entitled to no substantial weight whatever. On the other hand, the undisputed facts show that the wiretapping played an important part in inducing them to testify. In the case of Messman the time element is of such a character that the part must be considered to have been a conclusive one. He acquiesced in the Government's request that he testify for it only after he himself had been advised that extensive wiretapping had been indulged in, only after he had been placed in a cell with Nelson to whom an important incriminating message had been divulged by the Government, and only after Nelson had advised him of this message, the importance of which Messman himself fully understood (R. 515-6).

It must also be borne in mind that the Government made every effort to get various of the conspirators to agree to testify against others and to that end, and for that express purpose, called their attention to the fact that their wires had been tapped. Dailey testified that he told Messman and others about the wiretapping because he thought that would influence them to confess (R. 319, 375, 376, 833, 858, 859). He said:

"Q. Now isn't it a fact, Mr. Dailey, that the Government did use these taps for the purpose of inducing everybody they could induce to plead guilty? A. That

was certainly one of the purposes that they were called to their attention for" (R. 860).

In view of this objective on the part of the Government, it is difficult to see how it can now be heard to say that, having used the wiretaps in order to get the witnesses to testify and having succeeded in getting the witnesses to testify, nevertheless, the result was accomplished without the use of the illegal means.

(3) ***As to the use of the wiretaps in the course of preparation for trial.***

Obviously the Government's attorneys must have studied the wiretaps, even before the arrest of any defendant. Miss Schwartz testified that she prepared an index of all of the discs and of the summaries by means of which it was possible immediately to lay one's hand on the discs of any particular individual (R. 272, 273). Mr. Dailey testified at the preliminary hearing that they began getting summaries of the wiretaps within three or four days after wiretapping was first indulged in (R. 312). Asked what he did when the wiretaps were received, he said that they were filed away:

"* * * except we might discuss, when a tap came in that sounded as though it were good, we might discuss it among ourselves.

Q. Wasn't the first thing that was done to hear it? A. No.

Q. Or read it? A. We read the stenographer's summary of it" (R. 313).

He also admitted that he made disclosures of the contents of the taps in several instances, mentioning expressly Nelson and Berger and saying: "There may be three or four others,

I can't recall" (R. 315). The selection of the particular conversation with which Nelson was confronted on the day of his arrest was not accidental. The statement of the United States Attorney to the press at the time of the arrest, to the effect that "as a result of thousands of records of actual conversations" he possessed evidence which would lead to the conviction of the defendants (R. 454-5), was not inadvertent. And his statement in the summation at the *Weiss* trial, that the wiretaps were the "crux of the case" (R. 445-6) was not erroneous.

Concededly, the wiretaps were used in the course of preparing witnesses for their testimony in the *Weiss* case. The *Weiss* case cannot be divorced from the present case as far as this question is concerned. Both Weiss and Garrow were indicted at the same time and were named in one indictment (R. 388). Both cases were prepared together for presentation to the Grand Jury, and this preparation took place at a time when the Government was laboring under the mistaken impression that intrastate conversations could be used.

The wiretap evidence had been acquired over a period of many months and through the expenditure of many thousands of dollars. It is inconceivable that this evidence was entirely neglected by the prosecution.

POINT II.

The Government's use of the intercepted communications to obtain the testimony of Messman and Garrow was a violation of Section 605.

In its brief in opposition to the application for certiorari (p. 16, Note 9) the Government expressly conceded that the alternative ground advanced by the Court below, namely, that the statute prohibited only divulgence, not use, was erroneous. Now, however, the Government contends that, wholly apart from the question of petitioners' standing to complain, the statute was not violated by the use of the intercepted messages to obtain the confessions of Messman and Garrow. The Government seeks to escape the application of the "divulgence" portion of the statute by arguing that there must be a divulgence of a particular message and it seeks to escape the force of the "use" portion of the statute by contending that the use must be for the purpose of private financial gain. Neither of these contentions has any merit.

The first contention (Br. pp. 39-42), that there is no divulgence unless the contents of a particular message is revealed, is without support either in the words of the statute or in the facts of this case. The statute expressly bans divulgence, not only of the contents, but also of the existence of intercepted messages. Surely if the Government intercepts a series of messages by different persons and then advises one of them that it has done so, as it advised Messman in this case, the Government has thereby divulged the existence of those messages even though it may not have identified any particular communication. It has also disclosed the contents of the messages as well, for a mere description of their general nature is a divulgence of their contents. The contents of the series of messages may be disclosed without reference to any specific message. There

can be no doubt, therefore, that this conduct is forbidden under the plain language of the statute. Any other construction would deprive the statute of all meaning.

In any event the record discloses that in the case at bar a particular message was divulged to Messman. The Government induced him to testify, not only by telling him that his wires had been tapped, but also by placing him in the same cell with Nelson (R. 430). Nelson had previously been confronted with a particular message and he told Messman about it (R. 431, 858). That message was a significant one, being definitely incriminating (R. 860, 861). It referred to an incident which directly involved Messman, since the conversation which was intercepted took place in Messman's office and in his presence. At the hearing Messman testified that he knew what it referred to (R. 515, 516). There was thus a violation of the "divulgence" clause of the statute.

There was also a square violation of the "use" clause. As we have shown, the Government used the series of messages as a direct inducement to Messman to plead guilty and testify. It also used the contents of a particular message for the same purpose. The fact that the latter was done indirectly through Nelson is of no consequence. Moreover, in addition to this use of the contents of the messages, there was undeniably a use of their existence (R. 430, 431). This in itself is sufficient to make out a violation of the statute.

There is no basis for the assumption that a disclosure to Government officials and the use by them of such disclosure was permissible. Since this Court, in the first *Nardone* case (302 U. S. 379), held that the Government was not entitled to divulge intercepted messages, it is clear that use for the benefit of the Government is a use "for the benefit of another not entitled thereto", as provided in the statute. Indeed, the decision in the second *Nardone* case (308 U. S. 338),

would be meaningless had this Court not so construed the statute. And in the *Weiss* case (308 U. S. 321) this Court also indicated that a use of the character here involved was barred. It is wholly immaterial, therefore, that the interceptor may not have acted out of motives of private gain for himself or another.

The rule with regard to confessions relied on by the Government (Br. p. 44) has no application here. For an involuntary confession is barred, not because of violation of statutory command, but because of the general belief that a confession so obtained is unreliable. If, therefore, the facts indicated can be independently established, there is no objection to their use.

Finally, the Government contends that the connection between the tapping and the testimony was attenuated, and that therefore the result was free from taint. That of course involves a weighing of the evidence. We have previously demonstrated, both in the main briefs and in this reply brief, that this contention is unfounded in fact.

POINT III.

Petitioners have a standing to complain of the Government's violation of Section 605.

The Government contends (Br. p. 46 ff.), following the reasoning of the Court below, that the rule of construction which has heretofore been applied to the Fourth Amendment should likewise be applied to Section 605. As we have already demonstrated (Petitioner Schwartz' Br. pp. 14-18, Petitioner Goldstein's Br. pp. 19-25), the answer to this contention is twofold: (1) the rule of construction adopted by the lower federal courts with respect to the Fourth Amendment is erroneous and does not merit the approval of this Court, (2) in any event no proper analogy can be drawn between the Fourth Amendment and Section 605.

(1) The real purpose of the Fourth Amendment is broader than the mere protection of the person whose property has been unlawfully seized. That person may obtain redress by a civil action for damages. Had his private interest alone been involved it is doubtful whether this Court would ever have relaxed the old common law rule followed as late as *Adams* v. *New York*, 192 U. S. 585. It is reasonable to suppose that the basic reason for the present rule, first announced in *Weeks* v. *United States*, 232 U. S. 383, was the public interest in securing enforcement of the constitutional guarantee embodied in the Fourth Amendment. For, as Mr. Justice Bradley there said (p. 393):

> "The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

And, as Mr. Justice Holmes, dissenting, said in the *Olmstead* case, 277 U. S. at 470:

> "We have to choose, and for my part I think it is less evil that some criminals should escape than that the government should play an ignoble part."

(2) Whatever may be the proper rule with respect to the Fourth Amendment, we believe that there is no room for doubt as to what Congress intended in enacting the Communications Act. As Mr. Justice Roberts said in construing the Act in the first *Nardone* case (302 U. S. at 383):

> "Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty."

This view was reaffirmed in the second *Nardone* case. This Court has thus interpreted the purpose of the Act as going far beyond the mere remedying of wrongs done to particular persons. The purpose of the statute is to protect the people at large against iniquitous practices.

In support of its contention that the statute has purely a remedial purpose, the Government relies (Br. p. 48) upon the fact that the statute prohibits interception and divulgence only when those acts are not "authorized by the sender". We believe that that phrase is in no way inconsistent with the broader construction which this Court has heretofore adopted. Interception and divulgence of telephone messages without the knowledge and consent of the senders, is an iniquitous practice, but the practice is in no sense improper if both parties to the conversation consent. Hence, the statute has prohibited the practice

only where no such consent exists. The phrase in Section 605 with respect to the sender's consent therefore does not mean that only the sender may complain of the wrong. It means rather that the absence of consent is a prerequisite to the existence of the wrong. Once the wrong exists, the statute condemns it unequivocally and without qualification.

The Government also argues (Br. pp. 49-50) that the rule must be the same under the Communications Act as under the Fourth Amendment, because judicial construction having read into the Amendment a prohibition against the introduction of illegally seized evidence, the same meaning should be given to the express prohibition contained in the statute. But we are not dealing here with any such simple problem. As already pointed out, this Court may be of the opinion that the objective in prohibiting the introduction of evidence illegally seized in violation of the Fourth Amendment is satisfied by restricting the right to object to the owner or possessor of the thing seized. The Congress, however, has not so restricted the prohibition of the Communications Act. On the contrary, it has absolutely prohibited the divulgence of any illegally intercepted message. There can hardly be doubt that an attempt to place in evidence such a message itself, though against a person not involved in the conversation, would be considered a violation of the statute, and thus be banned. And, if a third person could object to this violation of the "divulgence" part of the statute, he should have the same standing to object to a violation of the "use" portion of the same statute. For there is no difference in this respect in the statute between the language dealing with the prohibition against divulgence and that dealing with the prohibition against use.

Finally, the Government contends (Br. p. 50) that this Court has recognized an analogy between Section 605 and

the Fourth Amendment by citing the *Silverthorne* case, 251 U. S. 385, in the course of its opinion in the second *Nardone* case (308 U. S. 338, 340-1). This contention is also unsound. The opinion in the second *Nardone* case reveals that the decision was rested upon the language of the Communications Act, and that the rule under the Fourth Amendment exemplified by the *Silverthorne* case was referred to only by way of illustration. Mr. Justice Frankfurter certainly had the provisions of the Communications Act in mind for he spoke of "direct" and "indirect" uses.

The cases cited by the Government (Br. p. 48) with regard to the privilege against self-incrimination are not in point. All three dealt with attempts by individuals to assert the privilege of a corporation and really rested only on the proposition that a corporation has no such privilege. Indeed, in the *Grant* case (227 U. S. 74) this Court was careful not to say that had the papers involved belonged to the individual client rather than the corporation, Grant could not have urged that their production would have incriminated that client.

CONCLUSION.

It is respectfully submitted, therefore, that in accordance with the views expressed in our main briefs the convictions should be reversed.

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